(1)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department Of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division One

BRIEF OF THE STATES OF CALIFORNIA, COLORADO, FLORIDA, IDAHO, IOWA, MICHIGAN, MONTANA, NEVADA, NEW YORK, NORTH DAKOTA, SOUTH DAKOTA, UTAH AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL E. LUNGREN
California Attorney General
THOMAS F. GEDE*
**Counsel of Record*
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
(916) 323-7355
Counsel for Amici Curiae States

(Additional Counsel on Inside Cover)

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OR CALL COLLECT (402) 342-2831

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GALE A. NORTON
Attorney General
State of Colorado

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

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State of Idaho

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State of Wisconsin

QUESTIONS PRESENTED

1. Does the Indian preemption doctrine determine the validity of a state tax imposed on federal contractors performing work for the Bureau of Indian Affairs on Indian reservations, where that doctrine has previously been applied only to taxpayers contracting with tribes, tribal members or tribal entities.

2. If the Indian preemption doctrine were applicable, does the Federal Lands HIghway Program evince a congressional intent to preempt state tax on the construction of public federal roads built for the Bureau of Indian Affairs on tribal reservations, as required by *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

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INTEREST OF THE *AMICI CURIAE*

Amici States regularly impose tax on federal contractors under sanction of the intergovernmental immunity doctrine as explicated in *United States v. New Mexico*, 455 U.S. 720 (1982). The decision below by the Arizona Court of Appeals rendered murky and uncertain this long-standing, bright-line rule. Unwisely, and without legal foundation, it extended application of the special Indian implied preemption doctrine to federal contractors working on tribal lands. The Indian preemption doctrine had previously been applied only to contractors dealing with tribes, tribal members or tribal entities. Amici thus believe the New Mexico Supreme Court's decision in *Blaze Construction Co. v. New Mexico*, 884 P.2d 803 (N.M. 1994), *cert. denied*, 514 U.S. 1016 (1995), which confirms their authority to tax receipts of federal contractors performing services anywhere within the state, is correct.

The uncertainty spawned by the Arizona Court of Appeals' opinion adversely affects States, the federal government and federal contractors. Tax compliance always is enhanced by doctrinal clarity. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2221 (1995) (emphasizing " 'the need for substantial certainty as to the permissible scope of state taxation authority' " in Indian country); *see also County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 267-68 (1992) (criticizing lower court's reasoning that would have resulted in litigation annually, "with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel"). The United States normally pays the cost of state tax imposed on federal contractors. Without predictability on these

issues, States and the federal government will be confused as to when taxes apply, often leaving the unwitting contractor stuck holding the bag.

Even were Indian law preemption principles applicable, the Arizona court's mode of analysis in applying those standards ignores this Court's recognition that where, as here, States provide governmental services on a reservation, they may tax nonmembers with respect to transactions there absent clear congressional intent to the contrary. Instead of that standard, the court below not only required petitioner to establish "a direct connection between the state's governmental services and the taxpayer's on-reservation activities" (Pet. App. 19 (947 P.2d at 843)) but also equated the simple existence of "comprehensive federal regulations" (Pet. App. 23-24 (947 P.2d at 845)) with the existence of the requisite congressional intent to preempt the state tax. Under that standard, a great many state taxes will be preempted notwithstanding the basic notion that, by contributing to the infrastructure of the reservation in ways quite similar, if not virtually identical, to its off-reservation governmental activities, a State helps make available "the privileges of living in an organized society" (*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 523 (1937)).

Amici States jealously guard their authority to tax. While none questions the supremacy of Congress to preempt such taxing authority when it invokes one of its enumerated powers, state taxation is too crucial to the very existence of state governments to have it preempted

without a compelling showing of congressional intent – a showing that is palpably absent here.

SUMMARY OF ARGUMENT

Arizona's tax on respondent Blaze Construction Company's receipts from federal road-building contracts is valid under the intergovernmental tax immunity doctrine. *United States v. New Mexico, supra.* No express provision of federal law preempts the Arizona state tax on Blaze's receipts.

The special Indian preemption doctrine applies only to the taxation by States of reservation activities or property of tribes or their members, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 136 (1973), and activities of nonmembers in connection with business relationships with tribes and their members on the reservation, *Warren Trading Post v. Arizona Tax Comm'n*, 350 U.S. 685 (1965); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Prior to the decision below, it had never been applied to relationships between the United States and its contractors.

Even were the Indian preemption doctrine applicable here, it would not act to preempt the Arizona tax. The Court's most definitive exposition of that doctrine for present purposes appears in *Cotton Petroleum* and makes clear that, as a usual matter, a State may tax nonmembers who do business within an Indian reservation regardless

of whether such business is with the resident tribe or its members unless Congress has manifested a contrary intent or the State has abdicated governmental responsibility for the reservation. Here, not only does Arizona provide significant on-reservation services, but the relevant federal statute authorizing Blaze's road building projects at issue – the Federal Lands Highway Program – also evinces an intent to treat all federal contractors equally with respect to bearing the incidence of state taxation and thus counsels directly against respondent's position.

ARGUMENT

The Supremacy Clause embodies two restrictions on the States' power to tax. The "intergovernmental tax immunity" doctrine prevents States, in the absence of explicit authorization from Congress, from directly taxing the federal government. The federal preemption doctrine allows Congress, if it is exercising one of its enumerated powers, affirmatively to preempt state authority to impose tax on transactions that States would otherwise be permitted to tax. *See, e.g.*, 49 U.S.C. § 40116.

In 1982, this Court decided two tax cases that reflect those Supremacy Clause restrictions and serve to define neatly the parameters of the issues in this case. In *United States v. New Mexico, supra*, the Court reaffirmed its repudiation of the "federal instrumentalities" aspect of the intergovernmental immunities doctrine. It held that federal contractors are subject to state tax on their receipts from services provided to the federal government, even

though the tax is passed on to the government, and even though the passed-on tax reduces the amount of services the federal government can buy. *See United States v. California*, 507 U.S. 746 (1993). Just three months later, *Ramah Navajo School Board, Inc. v. Bureau of Revenue, supra*, took a different approach to a state tax imposed on a construction contractor retained by a tribal school board. The Court there employed an interest balancing test that had been crystallized two years earlier in *White Mountain, supra*, for purposes of determining the power of States to tax a tribal non-member with respect to an on-reservation transaction with a tribe or its members. The Court invalidated the tax because it reduced the amount of construction services the tribe could buy, thereby interfering impermissibly with the federal regulatory scheme governing construction of tribal educational facilities.

At issue here are: (1) which doctrine determines the validity of Arizona's tax on Blaze and (2), if the special Indian law preemption principles control, whether the Arizona Court of Appeals properly applied them. The amici States believe that *New Mexico* standards are determinative and compel reversal of the judgment below. Nonetheless, even if Indian preemption principles are used to resolve Blaze's challenge to the tax, the result is unaffected since the requisite congressional intent to preempt is absent.

I. ARIZONA'S AUTHORITY TO TAX BLAZE IS DETERMINED UNDER INTERGOVERNMENTAL TAX IMMUNITY PRINCIPLES, NOT UNDER THE SPECIAL INDIAN PREEMPTION DOCTRINE.

For many years, this Court relied on an extension of the intergovernmental immunity doctrine to invalidate state taxes that arguably imposed an indirect economic burden on the federal government or its instrumentalities – contractors, lessees, employees, including Indian tribal contractors. Taxes were struck down based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax 'on' the government because it burdened the government's power to enter into the contract. *South Carolina v. Baker*, 485 U.S. 505, 518 (1988).

In the 1930s the federal instrumentality extension of the intergovernmental immunities doctrine "started a long path in decline. It has now been 'thoroughly repudiated by modern case law.' " *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. at 173-174 (1989). That repudiation formally occurred in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938), where the Court permitted nondiscriminatory state taxes on non-Indian contractors operating on an Indian reservation.

Today, the intergovernmental immunity doctrine prohibits only a direct tax on the federal government. A nondiscriminatory tax "collected from private parties contracting with another government is constitutional even though part or all of the financial burden falls on the other government." *Baker*, 485 U.S. at 521. This Court accordingly has affirmed repeatedly the authority of

States to impose such taxes on federal contractors. *United States v. California, supra; New Mexico, supra*. The parties in this matter agree that Arizona's tax on Blaze is nondiscriminatory. It is the same tax applied to all contractors building roads in Arizona. The intergovernmental immunity doctrine accordingly does not invalidate the tax at issue if that doctrine controls the outcome here.

That *New Mexico* and not the Indian preemption doctrine governs is plain for three reasons. *First* and foremost, the latter doctrine previously has been applied only to taxpayers dealing with tribal entities or tribal members on a reservation. *Warren Trading Post Co.*, at 685-686; (tax on sale of tangibles to tribal members on the reservation); *McClanahan*, 411 U.S. at 165-166; (tax on income earned by tribal member on the reservation); *White Mountain*, 448 U.S. at 139-40 (license and use fuel taxes imposed on nonmember tribal contractor conducting timbering operations solely on the Fort Apache Indian reservation); *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160, 161-62 (1980) (transaction privilege tax on vendor with respect to sale of tractors to tribe taking place on the reservation); *Ramah*, 458 U.S. at 835-36 (gross receipts tax on non-tribal construction contractor with respect to services rendered on the reservation to tribal school board); *Cotton Petroleum*, 490 U.S. at 168-69 (severance tax on non-member lessee for severance of oil and gas from tribal lands pursuant to lease with tribe). It has never been applied to federal contractors, notwithstanding their enormous presence in Indian country.

Second, this Court has "employed a preemption analysis that is informed by historical notions of tribal sovereignty" (*Rice v. Rehner*, 463 U.S. 713, 718 (1983)) – notions that are implicated only when tribal governments, entities or members contract with the taxpayer. The Court thus emphasized in *White Mountain* that "[t]he unique origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." *Id.* at 143. It is equally unhelpful to apply Indian law preemption standards in contexts outside those for which they were developed. Here, the United States is the contracting party, and it would be a strikingly odd result for the federal government to derive a species of tax immunity not from its own sovereign status but derivatively from "a domestic dependent nation[ ]" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)) over which it exercises plenary authority and which is powerless to control the relationship giving rise to the taxed gross proceeds. Blaze cannot use analytical sleight-of-hand to place Arizona tribes in the United States' stead for purposes of determining the appropriate preemption standard.

Third, the Arizona Court of Appeals' reasoning is anomalous from a public policy perspective. Although Congress's obligation to fulfill federal trust responsibilities to Indian tribes is certainly important, its obligation to protect the security of the *entire* nation is obviously no less important. Arizona's tax on Blaze was invalidated because it might limit how far federal dollars would go to build Indian reservation roads. But in *New Mexico*, this Court approved state tax on federal contractors building and supporting the nation's nuclear arsenal during the height of the Cold War, reducing by millions of dollars funds available for nuclear deterrence. Such differing treatment of state taxes imposed on federal contractors performing important federal obligations not only is irreconcilable with existing precedent but also makes no sense on quite practical policy grounds.

Blaze's contract with the federal government, in short, does not implicate the special Indian preemption doctrine. Arizona's tax meets the standards in *New Mexico* and is valid.

II. EVEN IF INDIAN PREEMPTION PRINCIPLES ARE APPLIED, THE ARIZONA TAX IS PERMISSIBLE.

While this case should be resolved upon a straightforward application of *New Mexico*, Arizona's transaction privilege tax easily passes constitutional muster when analyzed under preemption principles developed by this Court with respect to taxation of nonmembers actually doing business with a tribe or its members within an Indian reservation. That conclusion flows from *Cotton Petroleum* and its application of the Indian preemption doctrine.

A. Preemption Standards Applicable to Non-members Doing Business on Reservations with Tribes and Tribal Members

After the Supreme Court in the late 1930s thoroughly repudiated the intergovernmental immunity doctrine as applied to federal and tribal contractors, for a period of time the Court generally permitted state taxation of reservation activity. See, *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949). In 1965, however, the Court decided *Warren Trading Post*, the first of a series of cases relying on the federal preemption aspect of the Supremacy Clause to strike down state taxation of tribal contractors' on-reservation activity. Under intergovernmental immunity requirements, state taxation of non-Indian tribal contractors and lessees was no longer automatically forbidden, but Congress could affirmatively act to proscribe such tax by preempting it: "the trend has been away from the ideal of inherent Indian sovereignty as a bar to state jurisdiction and toward a reliance on federal preemption." *McClanahan*, 411 U.S. at 172 (1973). Thus, the inquiry shifted from determining whether Congress had authorized state taxation of non-Indian tribal contractors to whether Congress had forbidden it.

Because of the importance of tax collection to the very existence of state government, the Court had previously found preemption of state taxes only when Congress expressly stated its intention to preempt. *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 606 (1943); *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939); *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933). Implied preemption was not permitted. The cases which initially developed the Indian preemption doctrine, however,

were unique in allowing a finding of congressional intent to preempt state tax by implication. For example, in *Warren Trading Post Co.*, the Court ruled that even though the federal Indian trader statutes, 25 U.S.C. §§ 261, 264, did not expressly preempt state tax, they were "sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Id.*, 380 U.S. at 690. *Warren Trading Post* relied on the congressional intent implicit in these specific federal statutes to bar States from taxing federally licensed Indian traders on their sales to Indians on a reservation. In *Central Machinery Co.*, the Court again found that the Indian trader statutes preempted state tax on the sale of a tractor to Indians on the reservation because the transaction was covered by the statutes, even though the vendor had neglected to obtain the federal Indian trader license.

The significant feature of this early Indian preemption doctrine was that courts could find federal preemption by implication where reservation transactions with Indian tribes were involved. As this Indian preemption doctrine was developed in the early 1980s, however, it became unlike anything heretofore called federal preemption and increasingly divorced from a determination of congressional intent. In *White Mountain*, the Court emphasized that the Indian preemption doctrine was unprecedented. *Id.*, 448 U.S. at 143. The preemption inquiry no longer called for a determination of whether Congress intended to prevent states from taxing the activity in question and instead pointed to a balancing-of-interests approach, weighing underlying federal policies and purposes with tribal sovereignty interests and state

interests to determine the validity of the state tax. *Id.*, at 144-45. This new approach required a particularized inquiry into the nature of the federal, state and tribal interests at stake to determine whether, in the specific context, the exercise of state authority would violate federal law. *Id.*

Although the Court's opinion sought preemptive intent from pervasive federal regulations covering the harvesting and management of tribal timber, the crux of the decision was based on discerning an "overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . . ' " *Id.*, 448 U.S. at 149. The Court ruled, in effect, that any economic burden on tribal development was enough to invalidate a state tax. The consequence of the Court's ruling in *White Mountain* was to prevent a relatively low, non-discriminatory state tax from being imposed on a tribal contractor because that tax was passed on to the tribal entity and reduced its profits, as all taxes inevitably do. The dissent found it "difficult to believe that these relatively trivial taxes could impose an economic burden that would threaten to 'obstruct federal policies.' " *Id.*, 448 U.S. at 159.

Two years later, in *Ramah*, the Court struck down the New Mexico gross receipts tax imposed on a contractor building a school on the Navajo reservation for the Navajo school board. Once again, the Court cited a comprehensive federal regulatory scheme as the basis of the preemption, but fundamentally relied on the fact that passing on the economic burden of the state tax to the tribal entity "necessarily impedes the clearly expressed federal interest in promoting the 'quality and quantity' of educational opportunities for Indians by depleting the

funds available for construction of Indian schools." *Id.*, 458 U.S. at 842.

The dissent, cutting to the reality behind the Court's analysis, noted in dissent that the Court had adopted a "new analytic framework in which the extent of economic burden on the tribe, and not the preemptive effect of federal regulations, appears to be the paramount consideration." *Id.*, 458 U.S. at 848 (Rehnquist, J., dissenting.) The dissent also referred to the decision in *United States v. New Mexico*, handed down just three months earlier, which affirmed imposition of New Mexico's gross receipts tax on a federal contractor. The Court there held that "immunity may not be conferred simply because the tax has an effect on the United States, or even because the federal government shoulders the entire economic burden of the levy." *Id.*, 455 U.S. at 734. The dissent noted the anomalous effect of the Court's decision in *Ramah* according an Indian Tribe, whose sovereignty " 'exists only at the sufferance of Congress and is subject to complete defeasance,' greater immunity from state taxes than is enjoyed by the sovereignty of the United States on whom it is dependent." *Ramah*, 458 U.S. at 856-857.[1]

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[1] In many respects, the Court's whole excursion into the balancing of interests test in *Ramah* may have been unnecessary. *Warren Trading Post*, the first Indian implied preemption case, had already held that sales of tangibles to an Indian entity on a reservation were subject to the Indian trader statutes, preempting any state tax. That holding has subsequently been extended to the sale of services. *New Mexico v. Laguna Industries, Inc.*, 855 P.2d 127 (NM 1993). The Indian trader cases alone were sufficient precedent for the preemption of state tax on the sale of construction services to the Ramah Navajo School Board.

Finally, in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the Court acknowledged that the special Indian preemption doctrine developed in *White Mountain* and *Ramah* no longer focused primarily on congressional intent. In relying on considerations of competing interests, *"our cases have rejected a narrow focus on congressional intent* to preempt state law as the sole touchstone." *Id.*, 462 U.S. at 334 (emphasis added). The decision went on to identify "[c]ertain broad considerations [which] guide our assessments of the federal and tribal interests." *Id.* It cited several federal statutes which it asserted embodied the general federal commitment to the goal of promoting tribal self government, by which it included "Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.' " *Id.*, 462 U.S. at 335. The Court referenced those statutes in a footnote, citing the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975 and the Indian Reorganization Act of 1934. *Id.*, note 17.

Thus, the Court's opinions in the early 1980s on Indian preemption sanctioned the conclusion that any tax on a non-member, tribal contractor or lessee, the economic affect of which burdened a tribe, would inevitably be preempted by the general federal policies of encouraging tribal self government and economic development.

What had happened under the guise of this new analytic framework was that the extension of the intergovernmental immunity doctrine to federal instrumentalities – "thoroughly repudiated" in the late 1930s – had resurfaced when applied to tribes. In *White Mountain* and *Ramah* the Court used the special Indian preemption doctrine effectively to restore the intergovernmental

immunity doctrine to bar state taxation of tribal contractors because the economic burden of the tax, no matter how slight, was passed on to the tribal government. These cases had gone beyond finding preemption by implication to find preemption based on something other than congressional intent. Tribes are treated more favorably under this resurgent intergovernmental immunity doctrine than the federal government.

B. *Cotton Petroleum* Restored Congressional Intent As Touchstone of Indian Preemption Analysis

The pendulum began swinging back just six years later in the Court's "pathmarking decision" in *Cotton Petroleum. See Montana v. Crow Tribe*, 118 S. Ct. 1650, 1660 (1998). The Court stated "neither the IMLA, nor any other federal law, categorically preempts state mineral severance taxes imposed, without discrimination, on all extraction enterprises in the State, including on-reservation operations." *Cf. County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) ("[t]his Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands"). The principles noted in the dissents in *White Mountain* and *Ramah* gained majority support. The Court pulled back somewhat from the resurgent intergovernmental immunity doctrine under which any state tax which might affect tribal economic development was preempted. The Court signaled that change by relying on the intergovernmental immunity doctrine at the start of the decision and by

making clear that contractors of the federal government and tribes are to be treated the same way and are subject to tax "even though the financial burden of the tax may fall on the United States *or the tribe*." *Cotton Petroleum*, 490 U.S. at 175 (emphasis added).

The Court did not overrule the analytic underpinnings of *White Mountain* and *Ramah*. Nor did it fully return Tribes to an equal footing with the federal government under the intergovernmental immunity doctrine, which bars only discriminatory taxes on governmental contractors and lessees. But it did show by the nature of its analysis that it had abandoned the uncertain and unpredictable balancing-of-interests standard, the automatic striking down of any state tax the economic burden of which is passed on to the tribe and the reliance on the amount of federal regulation. The Court looked instead to the congressional intent as indicated in the particular statute authorizing tribal oil and gas leasing, the Indian Mineral Leasing Act of 1938. It found there no express or implied congressional intent to preempt state tax, *Cotton*, 490 U.S. at 177-183, that is to say, unless Congress prohibited the tax, it was not preempted.

Prior to *Cotton*, in *White Mountain* and *Ramah*, the Court had cited extensive federal regulation as a basis for preemption. Regulations governing Cotton's oil and gas severance on Indian lands were no less extensive than regulations governing timber severance in *White Mountain*. Compare the oil and gas regulations found at 25 C.F.R. Part 211, 30 C.F.R. Parts 202 and 206 and 45 C.F.R. Part 3162 with the regulations relied upon in *White Mountain* and *Ramah*. But the Court did not rely on federal regulation; it looked to congressional intent within the

relevant federal statute. *Cotton Petroleum*, 490 U.S. at 205. Indeed, the Court looked squarely at the mineral lessee's claim, based upon a letter submitted by the Secretary of the Interior during congressional consideration of the bill which eventually became the IMLA, that the statute was intended to secure for tribes " 'greatest return from their property.' " *Id.*, 490 U.S. at 179. Notwithstanding "a purpose of the 1938 Act is to provide Indian tribes with badly needed revenue," the Court concluded that "no evidence [exists] for the further supposition that Congress intended to remove all barriers to profit maximization" *Id.* at 180. It found similarly unpersuasive the lessee's reliance on the presence of a provision in an earlier mineral leasing statute applicable to Executive Order reservations, explicitly authorizing imposition of state taxes on oil and gas lessees because, inter alia, "[b]y the time the 1938 Act was enacted, . . . [the intergovernmental tax immunity rule in] *Gillespie* [*v. Oklahoma*, 257 U.S. 501 (1922)] had been overruled and replaced by the modern rule permitting such taxes absent congressional disapproval." *Cotton*, 490 U.S. at 182.

Most significantly, *Cotton Petroleum* rejected the notion of a universally applicable federal policy to encourage tribal economic development that would preempt state tax adversely impacting economic activity on the reservation in every case.

> Nor can a congressional intent to preempt state taxation be found in the Indian Reorganization Act of 1934 . . . , the Indian Financing Act of 1974 . . . , or the Indian Self-Determination and Education Assistance Act of 1975. . . . Although these statutes "evidence to varying

> degrees a congressional concern with fostering tribal self-government and economic development," *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980), they no more express a congressional intent to preempt state taxation of oil and gas lessees than does the 1938 Act.

Cotton Petroleum, 490 U.S. at 183, note 14. Thus *Cotton Petroleum* specifically denied any general preemptive effect of precisely those statutes – the Indian Self-Determination and Education Assistance Act and the Indian Financing Act of 1974 – upon which the Arizona court relied below.

The Court in *Cotton Petroleum* concluded its analysis of the preemption issue with a specific rejection of the expanded view of Indian implied preemption and an acknowledgment that such an analysis had represented an inappropriate revival of the federal instrumentalities corollary of the intergovernmental immunity doctrine. The Court recognized that the indirect effect of the tax on a tribal lessee might impair the federal policy favoring tribal economic development. But it found any such impairment "simply too indirect and too insubstantial to support Cotton's claim of preemption."

> To find preemption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in [*White Mountain v.*] *Bracker* and *Ramah Navajo School Board* would be to return to the pre-1937 doctrine of intergovernmental tax immunity. Any adverse affect on the Tribes finances caused by the taxation of a private party contracting with the tribe would be

> grounds to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine.

Cotton Petroleum, 490 U.S. at 187.

Cotton Petroleum did not squarely reject the use of implied preemption to determine the validity of state tax on tribal contractors performing services on reservations. However, it did firmly tie that preemption analysis back to congressional intent. Federal, state and tribal interests at stake remain relevant insofar as they informed Congress's intent. This return to a more bright-line standard provides state courts with an objective criterion upon which to determine whether a state tax has been preempted.

C. Congress Intended These Indian Reservation Roads to Be Treated the Same as Other Federal Lands Highways.

An examination of the federal statute which authorized Blaze's road-building projects makes unmistakably clear that Congress intended that these Indian reservation roads be treated the same as other Federal Lands Highway Program roads. 23 U.S.C. § 204(a) states:

> Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on the Federal-aid systems, there is established a coordinated Federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways, and Indian

reservation roads as defined in section 101 of this title.

This subsection emphasizing uniform treatment was added in Public Law No. 97-424, 96 Stat. 2114, on January 6, 1983. The former 23 U.S.C. § 208 specifically, which explicitly referred to Indian reservation roads, was repealed in the same Act, further driving home the fact that no special treatment is afforded Indian reservation roads.[2]

The Arizona Court of Appeals reasoned that, "because 23 U.S.C. § 204 makes no mention of state taxation," Congress did not intend to address this subject. Pet. App. 14-15 (947 P.2d at 842). That reasoning assumed congressional ignorance of this Court's decisions. Congress has long been fully aware of the Court's rejection in the late 1930s of the federal instrumentality corollary of the intergovernmental immunity doctrine. Moreover, *New Mexico* had just been decided in March 1982, a few months before Congress took up consideration of the amendments to the federal lands highway program in Public Law No. 97-424 between May and December 1982.

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[2] Only a few differences in administration of these several types of roads are provided. Forest highways and public lands highways are administered by the Secretary of Transportation; park roads, parkways and Indian reservation roads are administered by either the Secretary of Transportation or the Secretary of the Interior. Indian employment may be used on Indian reservation roads, and no ceiling on Federal employment is applicable; the "Buy Indian" Act and provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act apply to funds appropriated for Indian reservation roads to permit preferential hiring of Indians. In other respects these programs are administered similarly.

Congress, at just that time, was acutely aware of the state tax consequences for federal contractors; it can have had no question that contractors building federal lands highways on forest land or park land would owe state tax on their receipts from the projects.

Nothing in 23 U.S.C. § 204 intimates that Indian reservation roads are to be treated any differently for state tax purposes. Legislative history instead supports the interpretation that all these federal lands highways are to be treated alike. The Conference Committee Report to the 1983 amendments to that program in Public Law No. 97-424 emphasized that in both the House and Senate bills the "Secretary of Transportation is made responsible for oversight and coordinating the Federal lands highways in order to ensure that such highways are treated under the same uniform policies." H.R. Conf. Rep. No. 97-987, at 45, *reprinted in* 1982 U.S.C.C.A.N. 3692, 3709.

The few regulations promulgated concerning Indian reservation road construction hardly evidence a "comprehensive federal scheme" indicative of a congressional intent to preempt state authority to tax. See 25 C.F.R. § 170 *et seq.* Those regulations show that the Bureau of Indian Affairs – not the tribes – plans, surveys, designs and constructs these roads, just as the other federal administering agencies do for federal lands highways built on other federal lands within those agencies' jurisdiction. The roads must be approved by the Secretary of Transportation. The tribes, like other local governments in whose jurisdiction federal lands highways are being built, establish priorities. Although the tribes may contribute to the cost of these roads, 25 C.F.R. § 170.6a, as may the States, 25 C.F.R. § 170.7, no such contribution is

required, and none was made here. Any alleged preemptive effect of these few regulations is further weakened by the fact that the statute cited by several of the regulations for authority – 23 U.S.C. § 208 – was repealed in 1983.

The absence of any express or implied indication that Congress intended to preempt state authority to tax federal contractors building these federal lands highways should end Blaze's preemption argument. The Arizona court's summary rejection of any consideration of this relevant federal statute completely undermines the validity of its analysis.

In sum, the vice in the Arizona court's application of the Indian preemption doctrine is the confusion it introduces into what the Court has gradually distilled into bright-line standards for state taxation of activities by tribes, their members, and non-members doing business with either. First, States cannot impose the legal incidence of a tax on a tribe or its members with respect to reservation transactions or property absent clear congressional authorization. *See, e.g., Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, ___ U.S. ___, 118 S. Ct. 1904 (1998); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457-60 (1995). Second, States may tax non-members engaged in a reservation business relationship with a tribe or its members – at least where they provide governmental services to the reservation generally – unless Congress has evinced a contrary intent. *See, e.g., Cotton Petroleum*, 490 U.S. at 176-77, 187. These standards can be easily followed by States and taxpayers alike, thereby protecting important state and tribal interest and bringing a very substantial measure of certainty to an area of law that requires certainty. Here, Congress has done

nothing to impair Arizona's right to tax Blaze with respect to its gross receipts from the BIA contracts, and the state tax is therefore valid even if *New Mexico* principles are not deemed controlling.

CONCLUSION

For the reasons stated above, the decision of the Arizona Court of Appeals should be reversed.

Respectfully submitted,

DANIEL E. LUNGREN
California Attorney General
THOMAS F. GEDE*
**Counsel of Record*
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
(916) 323-7355
Counsel for Amici Curiae States